

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Humana Insurance Company,)	
Humana Inc., HumanaDental Insurance)	
Company, Humana Health Plan, Inc.,)	
CompBenefits Insurance Company,)	CG Docket No. 02-278
CompBenefits Dental, Inc., American)	
Dental Plan of North Carolina, Inc., The Dental)	CG Docket No. 05-338
Concern, LTD and Golden West Dental and Vision)	
Petition for Retroactive Waiver of 47 C.F.R.)	
§ 64.1200(a)(4)(iv))	

PETITION FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, and paragraph 30 of the Commission's October 30, 2014 Order¹ in CG Docket Nos. 02-278, 05-338 (the "*October 30 Order*"), Petitioners, Humana Insurance Company, Humana Inc., HumanaDental Insurance Company ("HDIC"), Humana Health Plan, Inc., CompBenefits Insurance Company, CompBenefits Dental, Inc., American Dental Plan of North Carolina, Inc., The Dental Concern, LTD and Golden West Dental and Vision (collectively "Petitioners" or "Humana"), request that the Commission grant them a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission's rules for alleged fax advertising Petitioners sent prior to April 30, 2015 to recipients who provided prior express permission or invitations to send such faxes.

I. The TCPA And The Opt-Out Notice Rule

Petitioners are insurers that provide various types of insured products to individuals and groups of insureds. They enter into contracts with persons and entities ("Agents") to market their products and solicit applications for insurance coverage from third parties. The Agents authorize

¹ *Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998 (2014) ("*October 30 Order*").

Petitioners, as part of their contracts, to communicate with them by facsimile at the facsimile numbers the Agents provide.

The Telephone Consumer Protection Act of 1991 ("TCPA"), as amended by the Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005), prohibits the dissemination of an "unsolicited advertisement" to a telephone facsimile machine. 47 U.S.C. § 227(b)(1). A violation of the TCPA gives rise to a private right of action in favor of a recipient for each offending fax. 47 U.S.C. § 227(b)(3). The TCPA provides an exception to its prohibition on the transmission of unsolicited fax advertisements when such faxes are sent pursuant to an "established business relationship" ("EBR"). To fall within that exception, however, those faxes must contain, *inter alia*, an "opt-out" notice that satisfies the requirements set forth in the statute. 47 U.S.C. § 227(b)(1). Congress directed the Commission to adopt regulations implementing the opt-out notice requirement for unsolicited fax advertisements transmitted pursuant to an EBR. 47 U.S.C. § 227(b)(2)(D).

In 2006, the Commission adopted rules specifying the opt-out language that must be included in unsolicited fax advertisements sent pursuant to an EBR. 47 C.F.R. § 64.1200(a)(4)(iii) and (v); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket No. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3801 para. 24. (2006) ("*Junk Fax Order*"); *October 30 Order*, ¶ 5. At the same time, the Commission adopted Section 64.1200(a)(4)(iv), which extended the opt-out-notice requirement to "solicited" fax advertisements, i.e., fax advertisements sent pursuant to a recipient's prior express invitation and/or permission (the "Opt-Out Notice Rule"). 47 C.F.R. § 64.1200(a)(4)(iv). A footnote in the *Junk Fax Order*, however, conflicted with the Opt-Out Notice Rule. Specifically, the footnote stated "the op-out notice only applies to

communications that constitute *unsolicited* advertisements.” *Junk Fax Order*, ¶ 42 n.154 (emphasis added).

II. The Commission’s Retroactive Waiver Orders

In its *October 30 Order*, the Commission confirmed that fax ads sent pursuant to a recipient’s prior express permission were required to contain the regulatory opt-out notice, but it also found that the *Junk Fax Order*’s conflicting statements presumptively created confusion over whether that notice was required for those faxes. *October 30 Order*, ¶¶ 15, 24. The Commission further observed that while its notice of intent to adopt the Opt-Out Notice Rule was legally valid, it could have been more explicit. *Id.* at ¶ 25.

In light of the potential for confusion about the applicability of the Opt-Out Notice Rule and the nature of the notice provided, the Commission determined good cause existed to grant a retroactive waiver of the Rule for petitioners who claimed to have sent fax advertisements pursuant to recipients’ prior express permission.² *Id.* at ¶ 26-28. The Commission further invited similarly situated parties to seek waivers of the Opt-Out Notice Rule.

On August 28, 2015, the Commission granted retroactive waivers to an additional 117 petitioners. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, CG Docket 02-278, 05-338, Order, DA 15-976, 30 FCC Rcd 8598 para. 11 (2015) (“*August 28 Order*”). Those petitioners were similarly situated to the petitioners granted waivers under the *October 30 Order* because: (1) they sent fax advertisements pursuant to the recipients’ prior express permission or invitation; (2) the faxes did not comply with the Opt-Out Notice Rule; and (3) all of the petitioners referenced the *Junk Fax Order*’s contradictory language concerning the

² The Commission made clear that “the granting of such waivers [should not] be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.” *October 30 Order*, ¶ 31.

Rule. *August 28 Order*, ¶¶ 11; *see also October 30 Order*, ¶s 14-16, 19. Those petitioners, therefore, were entitled to a presumption that the language created confusion or misplaced confidence about the need to include an opt-out notice in their solicited faxes. *August 28 Order*, ¶¶ 14-15; *see also October 30 Order*, ¶s 14-16, 19. Notably, not all of the August-28th petitioners faced lawsuits or potential liability due to the transmission of noncompliant fax advertisements. *August 28 Order*, ¶ 19. The Commission confirmed that factor did not make the petitioners dissimilar from previous petitioners, and it granted them retroactive waivers as part of its *August 28 Order*. *Id.* Finally, the Commission “observe[d] that a few of the petitions resolved by this Order were filed in May and June of this year, after the six-month (April 30, 2015) date referenced in the [October 30 Order].” *Id.* at ¶ 20. Because those petitions “sought waiver[s] for faxes sent prior to the April 30, 2015 deadline,” the Commission found that “granting waivers to th[o]se parties does not contradict the purpose or intent of the initial waiver order as the parties involved are similarly situated to the initial waiver recipients.” *Id.*

III. Argument

A. Good Cause Exists For Waiving The Opt-Out Notice Rule.

The Commission may waive the Opt-Out Notice Rule for good cause shown. *October 30 Order*, ¶ 23. Specifically, “[a] waiver may be granted if (1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.” *Id.* The Commission has already found both factors satisfied. The confusion caused by the conflicting text and footnote in the Junk Fax Order and the lack of explicit notice of the Rule “presumptively establishe[d] good cause for retroactive waiver of the [R]ule.” *October 30 Order*, ¶ 26; *August 28 Order*, ¶¶ 14-15. The confusion “caused businesses mistakenly to believe that the opt-out notice requirement did not apply” and “left some businesses potentially

subject to significant damage awards under the TCPA's private right of action or possible Commission enforcement." *October 30 Order*, ¶ 27. In weighing the petitioners' requests for a waiver, the Commission acknowledged "there is an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads," but concluded that, "[o]n balance, ... it serves the public interest in this instance to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward." *October 30 Order*, ¶ 27.

B. Petitioners' Request For A Retroactive Waiver Of The Opt-Out Notice Rule Is Warranted Because They Are Similarly Situated To Petitioners To Whom Such Waivers Were Previously Granted.

Petitioners are similarly situated to those persons and entities previously granted retroactive waivers of the Opt-Out Notice Rule. One or more of the Petitioners sent faxes to persons and entities pursuant to their prior express invitation and permission. The faxes were all sent prior to October 2008 and did not contain the specific opt-out notice called for by the Opt-Out Notice Rule. One of Petitioners' Agents, Lawrence S. Brodsky, sued HDIC in the Northern District of Illinois and alleged the faxes sent to him violated the TCPA by failing to include the required opt-out notice. Mr. Brodsky seeks certification of a class of persons and entities to which the faxes were transmitted – without regard to whether Petitioners had the recipients' prior express permission to send the faxes – and actual or statutory damages of \$500 for each fax transmission, or treble damages for transmissions sent in knowing and willful violation of the TCPA. Without a waiver, HDIC faces substantial potential liability for these faxes.

The Commission suggested in its *October 30 Order* that all similarly situated parties seeking a retroactive waiver do so within six months, i.e., before April 30, 2015. *October 30 Order*,

¶ 30. While Petitioners are seeking a retroactive waiver outside the Commission's suggested time frame, the faxes at issue were sent seven or eight years before the proposed April 30, 2015 filing date. Importantly, the Commission never suggested that date was a hard cut-off date for filing petitions. Indeed, the Commission recently granted waiver petitions filed as late as June 2015 on the basis that "[t]hese petitions sought waiver for faxes sent prior to the April 30, 2015 deadline" and "[a]s such, granting waivers to these parties does not contradict the purpose or intent of the initial waiver order as the parties involved are similarly situated to the initial waiver recipients." *August 28 Order*, ¶ 20.

IV. Conclusion

For the foregoing reasons, Petitioners, Humana Insurance Company, Humana Inc., HumanaDental Insurance Company, Humana Health Plan, Inc., CompBenefits Insurance Company, CompBenefits Dental, Inc., American Dental Plan of North Carolina, Inc., The Dental Concern, LTD and Golden West Dental and Vision, respectfully request that the Federal Communications Commission grant each of them a retroactive waiver from the opt-out notice requirements of 47 C.F.R. § 64.1200(a)(4)(iv) for faxes sent prior to April 30, 2015 with the permission of the requestor and from any liability under 47 C.F.R. § 64.1200(a)(4)(iv) for noncompliant faxes sent prior to April 30, 2015.

December 18, 2015

Respectfully submitted,

**HUMANA INSURANCE COMPANY,
HUMANA INC., HUMANADENTAL
INSURANCE COMPANY, HUMANA
HEALTH PLAN, INC., COMPBENEFITS
INSURANCE COMPANY, COMPBENEFITS
DENTAL, INC., AMERICAN DENTAL PLAN
OF NORTH CAROLINA, INC., THE DENTAL
CONCERN, LTD AND GOLDEN WEST
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